property,[22] and if limited to the attractive nuisance cases would be an illogical exception to the general principle that infants are responsible for their torts.[23] Third, reference has been made in some cases to the maxim *"Sic utere tuo ut alienum non laedas"*. At least one conclusive answer to the argument based upon that maxim is "that it refers only to acts of the landowner, the effects of which extend beyond the limits of his property."[24] Fourth, the more generally adopted reasoning invoked to support the decisions of the attractive nuisance cases in California, as well as in other jurisdictions, is that under the circumstances the law implies on the part of the landowner an invitation to the children to enter upon his premises. "The viciousness of this reasoning . . . . lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation."[25] In other words: "Temptation is not always invitation; . . . . it does not excuse a trespass because there is a temptation to commit it."[26]

None of the legal principles advanced to support the attractive nuisance cases is logically satisfactory or conclusive. Why not frankly confess that the question is one of sound public policy? "Conservation of child life and safety as to artificial perils is one of such importance that ordinary care may well hold everyone responsible for creating or maintaining a condition involving any such, with reasonable ground for apprehending that children of tender years may probably be allured thereinto."[27]

L. N. H.

TORTS: LIABILITY WITHOUT FAULT FOR RAILROAD ACCIDENTS: LAST CLEAR CHANCE.—Negligence cases are too much with us. They clog the courts. They turn on legal niceties; justice depends altogether on the chance occurrence of certain operative facts. A review of the existing law will here preface a suggestion for a comprehensive remedy.

Take a typical situation to illustrate the legal fencing involved. An engineer carelessly crashes into the plaintiff at a crossing. The railroad is liable in damages for its negligence; but not if it can interpose the plea of contributory negligence and show that the plaintiff was also careless. Nevertheless, the plaintiff can yet recover if he can show that the railroad had the last clear chance to avoid the accident, if, for example, the engineer in time to have averted the impact saw the plaintiff in danger, and unable to extricate himself

[22] Scott v. Watson (1859) 46 Me. 362, 74 Am. Dec. 457; Hutching v. Engel (1863) 17 Wis. 237, 84 Am. Dec. 741.

[23] 1 Cooley on Torts (3rd ed.) 177; 1 Shearman and Redfield, Law of Negligence (6th ed.) 313; Bigelow, Torts (8th ed.) 45; Clark and Lindsell, Law of Torts (6th ed.) 49.

[24] Walker v. Potomac F. & P. R. Co. (1906) 105 Va. 226, 53 S. E. 113, 115 Am. St. Rep. 871, 4 L. R. A. (N. S.) 80.

[25] Delaware L. & W. R. Co. v. Reich (1898) 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831.

[26] Holbrook v. Aldrich (1897) 168 Mass. 15, 46 N. E. 115, 60 Am. St. Rep. 364, 36 L. R. A. 493.

[27] 20 R. C. L. 80.

or unconscious of impending disaster.[1] When the engineer actually saw the impending collision in due time, his failure to prevent the crash was the proximate cause of the mishap, and the railroad is liable. Hence the railroad is not liable when the engineer did not see the coming impact at all, or at least if not in time to have prevented disaster.[2] But suppose that the reason the engineer did not see the plaintiff was that the engineer was not looking. The California courts[3] are positive that in this case the railroad is still not liable. It makes no difference that the engineer could have seen the plaintiff had he looked. This doctrine has just been reaffirmed by way of dicta in *Riney v. Pacific Electric Railway.*[4]

However, there is a strong contrary tendency to be observed in decisions throwing a greater liability on railroads in the interest of human life by making the last clear chance doctrine more favorable to the plaintiff. Thus certain federal cases[5] apply a rule of constructive sight, and hold the railroad liable not only when the engineer actually saw the danger, but also if by the exercise of reasonable care he could have seen the coming accident, or should have foreseen it. This so-called "humanitarian doctrine" practically makes negligence on the part of the plaintiff no defense to the railroad. And why not? Was not the acceptance of this defense by the courts a confession of their inability properly to apportion responsibility between two parties, both to blame, but not equally?[6] Do not the rules of contributory negligence and actual sight in last clear chance situations protect railroads altogether too much from liability for injury to human life, especially in view of the doctrine that the fact that the plaintiff was injured raises a presumption that he was guilty of contributory negligence?[7]

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[1] 20 R. C. L. 138; Bohlen, Cases on Torts, Vol. 2, p. 1384, footnotes; Harrington v. Los Angeles Railway (1903) 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238; Esrey v. Southern Pacific Co. (1894) 103 Cal. 541, 37 Pac. 500.

[2] Lawrence v. Goodwill (1919) 30 Cal. App. Dec. 637, 647, 186 Pac. 781; Iowa Central Railroad Co. v. Walker (1913) 203 Fed. 685; Bohlen, Cases on Torts, Vol. 2, p. 1387, footnotes.

[3] Herbert v. Southern Pacific Co. (1898) 121 Cal. 227, 53 Pac. 651; Stark v. Pacific Ry. (1916) 172 Cal. 277, 156 Pac. 51; Thompson v. Los Angeles Ry. (1913) 165 Cal. 748, 134 Pac. 709. For analysis and comment on last clear chance doctrine in California see 2 California Law Review, 76; 3 California Law Review, 245. See also 5 Iowa Law Bulletin, 36, 43.

[4] (December 19, 1919) 30 Cal. App. Dec. 1028, 187 Pac. 50. See also Griswold v. Pacific Elec. Ry. (December 17, 1919) 30 Cal. App. Dec. 922, 187 Pac. 64, and Young v. Southern Pacific Co. (1920) 59 Cal. Dec. 283.

[5] Brien v. Detroit United Ry. (1917) 247 Fed. 693, 699, citing many federal cases as well as decisions from state courts. See also Bohlen, Cases on Torts, Vol. 2, pp. 1400, 1401, 1408, footnotes; 20 R. C. L. 143; 24 Case and Comment, 885; 3 Virginia Law Register (N. S.) 321. For criticism see 21 Law Notes, 85; 2 Iowa Law Bulletin, 122-126. This rule is not applied in favor of trespassers. See Bohlen, Cases on Torts, Vol. 2, p. 1388, footnotes.

[6] See 20 R. C. L. 101, n. 16, 102, n. 5. Contrast the method in admiralty. There the loss is divided equally between both parties, though one was more to blame than the other. But neither rule solves the situation justly. Cayzer v. Carron Co. (1884) L. R. 9 A. C. 873. Marsden, Collisions at Sea (7th ed.), p. 136 and ff. The English Maritime Act of 1911 now adopts the rule of comparative negligence.

[7] Herbert v. Southern Pacific Co., supra, n. 3, says "the very fact of injury will raise a presumption that (the person hurt) did not take the

Under sound principles should not the railroad be liable in every case of injury to human life, irrespective of negligence?[8] Liability without fault no longer startles the lawyer. Workmen's compensation laws have educated the profession both to the practicability and desirability of this principle. Indeed before the last century tort liability was absolute and did not depend on negligence.[9] The rule of constructive sight or the humanitarian doctrine is but a partial attempt to re-establish such a liability.

Why should the burden of loss to human life depend upon the chance occurrence of those facts giving rise to the display of the legal subtleties reviewed above? The loss to society is the same in any event. A certain number of accidents due to carelessness or otherwise are sure to occur every year. Why should this inevitable loss lie where it falls, upon that part of society least able to bear it? Should it not rather be borne as part of the cost of operating expenses? In fact the public already bears a large share of the cost of railroad accidents; for the amount the railroad pays out in litigating claims and paying damage suits is a legitimate factor in rate-fixing.[10] To make the railroad absolutely liable, to require it to insure its liability, to grant it perhaps slightly increased rates, and then to turn the whole matter over to an administrative board, would probably be cheaper in the long run anyway, as experience with the workmen's compensation law justifies us in believing.[11] Besides, this remedy would remove the whole existing scheme of ambulance chasers, long delays, overcrowded courts, bought expert medical testimony, chance verdicts, split contingent fees, and the like. The plan is especially feasible with railroads, which are public service corporations.[12] The workmen's compensation act cuts one great mass of unnecessary litigation from our judicial calendars. Why not remove another, and leave the courts more free to make justice quicker?[13]

J. C. S.

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required precautions". Here a jury verdict in favor of the plaintiff was reversed; the court held that although the railroad failed to ring the bell and blow the whistle as required by statute that under the circumstances negligence was a question of law, and hence not one of fact for a sympathetic jury.

[8] Perhaps this suggestion goes too far with respect to trespassers, but as to other members of the public, travelers either upon the cars or properly on the right of way, it is no more than an extension of the principle of the humanitarian doctrine and the workmen's compensation laws.

[9] 33 Harvard Law Review, 86; 30 Harvard Law Review, 413, 417; 31 Harvard Law Review, 954.

[10] Arkansas Rate Cases (1911) 187 Fed. 290, 306.

[11] 27 Harvard Law Review, 235, 237, 344, discussing extension of the principle of the workmen's compensation laws; 27 Harvard Law Review, 233.

[12] 29 Harvard Law Review, 714 and ff. discussing constitutional implications as affected by the public character of railways, and pointing out that contributory negligence is a rule of law in which no one has a property right. 25 Harvard Law Review, 133.

[13] 29 Harvard Law Review, 705-723, an article by Arthur A. Ballantine discussing completely the implications of liability without fault for railway accidents. See also Storey, Reform of Legal Procedure, ch. 2.